



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 651 of 2004

OWINO OKEYO & COMPANY ADVOCATES
APPLICANT

VERSUS

MIKE MAINA1ST
RESPONDENT

MUTHITHI INVESTMENTS COMPANY LIMITED.2ND
RESPONDENT

R U L I N G

- (1) On the 4th May 2006, Mike Maina and Muthithi Investments Company Ltd. (“**the Applicants**”) took out a Notice of Motion under Order 50 rule 1 and Order 21 rules 6 and 7 of the Civil Procedure Rules and Sections 3A and 94 of the Civil Procedure Act, seeking an order of stay of warrant of attachment and sale issued in execution of a decree given by this court in favour of Owino Okeyo & Company, Advocates (“**the Advocates**”), the Respondents in this Motion.
- (2) The grounds upon which the application is made are that —
 - (a) The decree was made on behalf of a firm which had been dissolved and therefore incapable of sustaining legal proceedings.
 - (b) Execution commenced without taxation of costs of the proceedings.
 - (c) The execution proceedings are null and void *ab initio*.
 - (d) The Applicants have already settled costs due to the Advocates in the matter together with costs in relation to other matters.
- (3) The affidavit in support of the application was sworn by Nicholas Kanyeke, the Financial and Operations Controller of Muthithi Investments Company Ltd., on the 4th May 2006. His contention is essentially that the application for execution is unsustainable because it was brought by a dissolved firm.
- (4) Along with the replying affidavit of Stephen Omondi Owino sworn and filed on the 23rd May 2006, the Advocates filed Grounds of Opposition on the 16th May 2006 and also raised a preliminary objection, by notice dated and filed on the 24th May 2006, that the application is an abuse of the process

of the court and should be struck out.

(5) The Applicants engaged the Advocates to act for them in a number of matters and they undertook a considerable amount of work before the Advocate/Client relationship came to an end before all matters were concluded. At that point in time, the original firm under the name and style of Owino Okeyo & Company, Advocates had been dissolved and the remaining partner, Mr. Stephen Omondi Owino, was now practicing under the name and style of S.O. Owino & Associates, Advocates.

(6) In this particular case, the relevant file was released to the Applicants before the fees due to the Advocates were paid. The Advocates rendered a bill of costs which the Appellants refused to pay. In the end, the Advocates filed an itemized bill of costs which was taxed and certified by the Deputy Registrar of the High Court of Kenya on the 8th June 2005. On the 4th July 2005, the Deputy Registrar issued a Certificate of Taxation in the sum of K.Sh.153,182.50.

(7) On the 4th August 2005, the Advocates applied by Notice of Motion under Section 51(2) of the Advocates Act for judgment for the amount certified together with interest and costs. The application was heard by Visram, J. and His Lordship entered judgment for the Advocates for K.Sh.153,182.50 together with interest thereon at the rate of nine *per centum* (9%) per annum from the 1st September 2001 until full payment.

(8) In that application, the Applicants did not file any affidavit. The only objection taken on their behalf by learned counsel was that the Advocates were not entitled to judgment because they had not exhibited a retainer as required under Section 51(2) of the Advocates Act.

(9) In the course of his ruling delivered on the 7th December 2005, the learned Judge said:

“Section 15(2) aforesaid allows the client — the Respondent in this case — to “dispute” the retainer, meaning to challenge the very instructions he is alleged to have given. And the onus to do so is on the client/Respondent. That onus cannot possibly shift on the Applicant. The Respondent here has not discharged that onus, and has not disputed the retainer. Accordingly, I find that the Applicant has complied with the requirements of Section 15(1) and is entitled to the orders sought, including the order relating to interest of 9% under Regulation 7 of the Advocates (Remuneration) Order.”

(10) Immediately after the delivery of the ruling, the Applicants applied for an order of stay of execution and the learned Judge granted a stay of thirty days. And that order of stay has been extended from time to time ever since. The Applicants are now asking for the orders I have already set out hereinbefore. The issue I have to decide is whether or not they are entitled to those orders.

(11) If the Applicants genuinely believed that the Advocates had no right to recover the fees they were demanding, they should have raised the issue of dissolution of the partnership at taxation before the Deputy Registrar. They did not raise the point at that stage. That was the earliest possible stage they could have raised it. Having not raised the issue before the Deputy Registrar, the Applicants had the second and last chance to do so before Visram, J. at the hearing of the application for judgment but, again, they did not do so. On both occasions, they were represented by an Advocate. The only point they took before Visram, J. was as regards the retainer which the learned Judge considered and decided against them.

(12) Once the decree had been issued, the only reason execution could be stayed was if the Applicants said they were aggrieved by the ruling and decree of the learned Judge and they wished to appeal against it. Looking at the orders they now seek, there is no indication that they intend to take any steps to have the decree set aside. All they are asking for is the cancellation of warrants of attachment and sale of their property.

(13) For these reasons, the Notice of Motion dated and filed on the 4th May 2006 fails and it is hereby dismissed with costs to the Respondent (the Advocates). Consequently, the order of stay of execution

granted by Visram, J. on the 7th December 2005 be and is hereby vacated and discharged.

Orders accordingly.

Dated and delivered at Nairobi this Seventh day of August 2006.

P. Kihara Kariuki

Judge